

A. O. asks the Utah Labor Commission to review Administrative Law Judge Eblen's denial of Ms. O.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

While working for Sundwall on March 17, 1998, Ms. O. accidentally injured her back. Sundwall accepted liability under the Workers' Compensation Act for Ms. O.'s injuries. For the next three years, Ms. O. received continuing medical care for back pain. On March 14, 2001, at the advice of her treating physician, she underwent spinal fusion surgery. She then filed an Application For Hearing on March 21, 2001, to compel Dr. Sundwall and his insurance carrier, the Workers Compensation Fund (referred to jointly as "Sundwall" hereafter), to pay additional workers' compensation benefits in connection with that surgery.

Judge Eblen conducted an evidentiary hearing on Ms. O.'s Application on January 30, 2002, then appointed a medical panel to consider the medical aspects of the claim. After receiving the panel's report on April 18, 2003, Judge Eblen issued her decision on September 23, 2003. Judge Eblen's decision denied Ms. O.'s claim for additional benefits on the grounds that her fusion surgery had not been necessary to treat her work-related injuries.

In her motion for review of Judge Eblen's decision, Ms. O. argues that, even if the surgery in question was not necessary, she was entitled to rely on the treatment recommendations of her physician.

FINDINGS OF FACT

The parties do not dispute Judge Eblen's findings of fact. In summary, Ms. O. injured her back on March 17, 1998, while working as a nurse for Sundwall. She then began a course of treatment that included numerous diagnostic tests and conservative treatment by many different health care providers.

On June 23, 1998, Ms. O.'s initial treating physician referred her to Dr. Fogg, a spine surgeon. For more than two years, Dr. Fogg continued Ms. O.'s course of conservative care, with additional diagnostic tests. Then, on December 4, 2000, Dr. Fogg recommended spinal fusion surgery. Sundwall obtained a second opinion from Dr. Knoebel denying the need for such surgery. Dr. Fogg performed the surgery on March 14, 2001. Thereafter, Ms. O. has continued to required additional medical care, primarily for pain management and relief.

The medical panel's report concludes that Ms. O.'s surgery of March 14, 2001, was not necessary at that time.

DISCUSSION AND CONCLUSION OF LAW

The question presented in this case is whether the cost and consequences of Ms. O.'s surgery are compensable under the Utah Workers' Compensation Act, even if the surgery is later judged to have been unnecessary. The Utah Supreme Court addressed a similar question in Gunnison Sugar Co. v. Industrial Commission, 275 P. 777 (Utah 1929). There, a worker injured his back. His physician believed the worker's continuing back pain was caused by rheumatism that was in turn caused by the worker's teeth. At the physician's direction, the worker's teeth were extracted. It was later determined that this procedure had been completely unnecessary to treat the unfortunate worker's work-related back injury. Under these facts, the Utah Supreme Court held that the worker was entitled to workers' compensation benefits for the extraction of his teeth. The Court stated:

So, though it be assumed that the physician who diagnosed the employee's condition as that of rheumatism was negligent or unskillful, or incompetent, and that in consequence thereof the employee's teeth were extracted, yet, inasmuch as no claim is made that the employee was negligent in seeking or employing such physician, the aggravated loss or condition of the employee so occasioned by the negligence or unskillfulness of such physician cannot be said to be due to an independent and intervening cause but must be held attributable to the accident resulting in injury which as a primary cause set in motion a train of events from which the aggravated condition resulted.

In *Larson's Workers' Compensation Law*, §10.09(1), Professor Larson states essentially the same rule: "It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. Examples include exacerbation of the claimant's condition, or death, resulting from . . . corrective or exploratory surgery." At §10.09(2), Professor Larson further observes that "(f)ault on the part of the physician, such as faulty diagnosis, improper administration of anesthesia, excessive surgery, or a slip of the surgeon's knife, even if it might amount to actionable tortiousness, does not break the chain of causation."

In light of the foregoing, it appears to the Commission that Ms. O. may well be entitled to benefits stemming from the surgery performed by Dr. Fogg. However, the Commission notes that Judge Eblen did not address this precise question in her decision. Specifically, the facts set forth in the decision do not address whether Sundwall knew of Dr. Fogg's plans for surgery; whether Ms. O. knew of Dr. Knoebel's contrary opinion, or whether Sundwall affirmatively denied authorization for the surgery. Other facts may also bear on the proper resolution of Ms. O.'s claim.

In light of the foregoing, the Commission remands this matter to Judge Eblen to develop the facts surrounding Dr. Fogg's surgery on Ms. O.'s spine, then issue a new decision addressing the questions raised in this decision.

ORDER

The Commission remands this matter for further proceedings consistent with this decision. It

is so ordered.

Dated this 6th day of April, 2004.

R. Lee Ellertson, Commissioner

